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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1011

ARMORED CARRIER CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees,

B.D.C. CORPORATION,
Intervening Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM.

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Motion to Affirm.

Pursuant to paragraph 1(c) of Rule 16 of the Rules of this Court, B.D.C. Corporation moves that the judgment of the district court be affirmed.

Statement.

This is a direct appeal from the final judgment of a three judge district court, reported at 260 F. Supp. 612, dismissing appellant's suit to set aside an order of the

Interstate Commerce Commission, reported at 99 M. C. C. 126. (See J. S. App. B. and F.) Said order granted the application of the intervening appellee ("B.D.C.") for a certificate of public convenience and necessity authorizing it to operate as a common carrier by motor vehicle of cancelled checks ("cash letters") between Chicago, Illinois and five Wisconsin counties—Kenosha, Walworth, Jefferson, Dodge and Columbia. By the same order, the Commission also dismissed a complaint brought against B.D.C. by Armored Carrier Corporation ("Armored").

B.D.C. is a common carrier engaged principally in the transportation of cash letters for banks and banking institutions. On April 4, 1957 the ICC issued B.D.C. a certificate of public convenience and necessity authorizing it to transport cash letters between Chicago and fifteen Wisconsin counties, not including Kenosha, Walworth, Jefferson, Dodge and Columbia ("the five counties"). B.D.C. thereupon commenced serving the fifteen counties and, in addition, the five counties, although it was not authorized to serve the latter. It has continued to serve all of these counties to the present day. The Commission stated, with reference to B.D.C.'s operations between Chicago and the five counties,

> "These five counties are in B.D.C.'s line of haul between Chicago and the other 15 counties. B.D.C. thought it had been granted authority to serve these along with the other 15 counties. Because of this and the inexperience of its management these operations were inadvertently begun." J. S. App. F. at p. 63.

The record shows and the burden of the ICC's opinion demonstrates that B.D.C. was unaware of its lack of author-

ity to serve the five counties until late November, 1961. (See J. S. App. F. at p. 66; R 68-70, 192-194, 220-221).*

Armored, a contract carrier engaged in the same business as B.D.C., filed a complaint against B.D.C. with the Commission on November 27, 1961 alleging the unauthorized operations between Chicago and the five counties and praying that they be enjoined. B.C.D. applied for authority to serve the five counties on December 1, 1961. (J. S. App. F. at p. 62). The Commission granted it emergency temporary authority to do so on December 6, 1961 and temporary authority, pending the final outcome of its application, on January 2, 1962. Armored, of course, appeared in the complaint proceeding before the ICC, and also appeared in the application proceeding to protest the grant of authority to B.D.C.

The Commission dismissed Armored's complaint. In it, Armored sought to enjoin the ICC from issuing a temporary authority to B.D.C. to conduct the Chicago-five counties operation and also prayed for a cease and desist order against the continuance of this operation. The initial hearing on this complaint was held on April 30, 1962. By that time B.D.C. had already received temporary authority. This fact mooted both branches of Armored's complaint; Armored could no longer restrain the ICC from issuing the temporary authority for it had already been issued, nor could Armored obtain a cease and desist order against the Chicago-five counties operation for said operation was then being lawfully conducted pursuant to the temporary authority. The hearing examiner accordingly dismissed the complaint as moot and the Commission affirmed.

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* References preceded by an "R" are to the transcript in the complaint proceeding before the Commission; references preceded by a "T" are to the application proceeding.

Armored did not appeal from the dismissal of its complaint.

Before a certificate of public convenience and necessity can be granted, the ICC must find, *inter alia*, that the applicant is "fit, willing and able [1] properly to perform the service proposed and [2] to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder . . .". 49 U. S. C. A. §307(a) (Integers Added). The Commission found that B.D.C. satisfied the first criterion. Armored did not attack this finding or the evidence underlying it in the district court, nor does it attack said finding here.

Rather, Armored based practically its complete case before the Commission* on the contention that B.D.C.'s unauthorized operations and other alleged transgressions rendered it unfit "to conform to the provisions of" the Act and "the requirements, rules and regulations of the Commission thereunder." When the Commission made the peculiarly discretionary finding that it would trust B.D.C.'s management with a certificate of public convenience and necessity**, Armored appealed to the district court on the same grounds it is urging here, *viz.* that the ICC failed to make adequate subsidiary findings as to B.D.C.'s trustworthiness and that its ultimate finding was unsupported by substantial evidence. A majority of the district court rejected both contentions.

Armored's Jurisdictional Statement relies seriously only on the former ground. B.D.C.'s position is that (a) the Commission did make findings concerning the character of

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* Armored called no witnesses in support of its protest. (J. S. App. F. at p. 64).

** B.D.C. had substantially different executive personnel at the time of the Commission's decision than it had when the unauthorized operations were begun or in the 1957-1961 period. (R 28, 155-57, T 430, 505).

the applicant,* and (b) the Commission's subsidiary findings and the manner in which it discharged its function were clearly adequate within the meaning of controlling decisions of this Court.**

Argument.

B.D.C. moves to affirm for the reasons stated in the brief of the Solicitor General.

Conclusion.

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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* In addition to the language quoted *supra* at p. 2 and the explicit finding that B.D.C. was fit (J. S. App. F at p. 69), the ICC also observed "While we do not condone applicant's past unauthorized operations, we conclude that the evidence as to these operations does not require a finding of unfitness", and "admonished" B.D.C. that "Under the circumstances . . . it is expected to conduct future operations in accordance with the act and our rules and regulations thereunder." (*Id.* at p. 68).

** *E.g., U. S.* v. *Pierce Auto Lines*, 327 U. S. 515 (1946); *Southern Kansas Greyhound Lines* v. *United States*, 351 U. S. 921 (1956), *affirming* 134 F. Supp. 502 (W. D. Mo. 1955).